

U.S. Department of Labor

**Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002**

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'Notice: This is an electronic bench opinion which has not been verified as official'

Date: 12/28/99

Case No. **1997 INA 527**

In the Matter of:

MARIA LOURDAS PASAMBA, Employer

on behalf of

JULIE MARINA PAIZ, Alien

Appearance: D. E. Korenberg, Esq., of Encino, California.

Certifying Officer: R. M. Day, Region IX.

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of Julie Marina Paiz (Alien) by Maria Lourdas Pasamba (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U. S. Department of Labor at San Francisco, California, denied this application, the Employer requested review pursuant to 20 CFR § 656.26.

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor (Secretary) has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U. S.

workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U. S. workers at the prevailing wage and under prevailing working conditions through the State Employment Security Service and by other reasonable means in order to make a good faith test of U. S. worker availability.

STATEMENT OF THE CASE

On September 1, 1994, the Employer applied for alien labor certification of a position of full time permanent employment as a "Cook, Domestic," for a Private Homeowner with the following duties:

Plan, prepare and cook meals in private home. Bake bread and pastries. He/She will: plan menu according to employers suggestions; shop for food items and maintain refrigerator well stocked; peel, wash, trim prepare vegetables, meats, soups and desserts; clean kitchen and maintain kitchen area clean and orderly; wash dishes, pots and pans and other kitchen utensils; set table and serve meals; serve drinks and refreshments; prepare low sodium, low cholesterol family lunches and dinners. Order food items.

AF 162, item 13. (Copied verbatim without correction or change.)¹ The position was classified under DOT² Occupational Code No 305.281-010 as "Cook, Domestic Service."³ The forty hour week ran Wednesday through Sunday from 8:00 to 10:30 AM and from 3:30 PM to 9:00 PM, with Monday and Tuesday as days off.⁴ The salary was \$12.16 per hour plus time

¹The Alien, who is a National of Guatemala, completed grammar school in 1960. She worked as a baker from March 1982 to May 1990. The Alien worked as a cook in a private home in Guatemala from June 1990 to August 1993, after which she was unemployed. From August to December 1993 she was unemployed until December 1993. She became self-employed January 1994, remaining in that occupation until the date of application, February 28, 1995. During her period of self-employment she cooked and catered when she received orders at her home. in Glendale, California. AF 198-199.

²Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

³DOT No. **305.281-010 Cook (Domestic ser.)**Plans menus and cooks meals, in private home, according to recipes or tastes of employer: Peels, washes, trims, and prepares vegetables and meats for cooking. Cooks vegetables and bakes breads and pastries. Boils, broils, fries, and roasts meats. Plans menus and orders foodstuffs. Cleans kitchen and cooking utensils. May serve meals. May perform seasonal cooking duties, such as preserving and canning fruits and vegetables, and making jellies. May prepare fancy dishes and pastries. May prepare food for special diets. May work closely with persons performing household or nursing duties. May specialize in preparing and serving dinner for employed, retired or other persons and be designated Family-Dinner Service Specialist(domestic ser.).

⁴For Employer's explanation of the family situation and the reason for the split shift in the hours of the job offer, see AF 167.

and a half for overtime as needed. Although Employer did not state any educational or training hiring standard, two years of experience in the Job Offered or two years' experience in the Related Occupation of Baker were required. The Other Special Requirements were: "Must be able to plan menus and prepare dishes for parties. Must have experience with preparation of low sodium, low cholesterol meals." *Id.*, Item 15.

Notice of Findings. On March 21, 1996, the CO's Notice of Findings ("NOF") denied the application, subject to rebuttal. (1) Citing 20 CFR §§ 656.3 and 656.20(c)(8), the NOF said a *bona fide* job did not exist because the position described was not clearly full time and was not clearly open to U. S. because it appeared newly created for the Alien. (2) The CO further found that the Employer had not demonstrated an ability to pay annual wages in the annual amount of \$25,292.80, that Employer offered for this position pursuant to 20 CFR §§ 656.20(c)(1) and (4). (3) Finally, the NOF said that the position was offered subject to hiring criteria that are not normally required for the successful performance of the job in the United States, and which appeared unduly restrictive in violation of 20 CFR § 656.21(b)(2)(i)(A). The CO then specified the evidence required to sustain the Employer's burden of proof as to all of the issues raised in the NOF. AF 155-159.

Rebuttal. The Employer filed a rebuttal on May 21, 1996, to which were attached a statement of the Employer, financial data, and a statement justifying the need for dietary cooking required by the job description. AF 122-153. Mrs. Pasamba's statement explained that a cook was needed for service in her household, which consisted of herself, her husband, and her three children. The work would include preparation of thirty-two meals per week for the family, including meals prepared ahead for the cook's days off. In addition, the husband conducted dinner meetings at home once a week for a number of sales representatives of the automobile firm for which he works.⁵ The Employer's total 1995 salaries before income taxes from which the couple would pay the cook's wages of \$25,292.80, were \$74,048.79, for the husband and \$29,123.21 for the wife, or a total of \$103,172 before taxes. AF 131-134.

Final Determination. Certification was denied in the Final Determination, which the CO issued on July 30, 1996. The CO concluded that the Employer had failed to sustain the burden of proving the existence of a full time position for a domestic cook, based on 20 CFR § 656.3. The CO said the rebuttal information was not sufficient to explain convincingly what the worker would do during all of the work hours stated in the job description. The CO explained that, "While it may appear that there is a need for some meal preparation, the job duties to be performed by the cook do not appear to constitute full time employment." As the position was not convincingly shown to be a permanent, full time job, the Employer remained in violation of 20 CFR § 656.20(c)(8).

⁵The number and identity of the weekly business guests was not provided, nor were the other occasions when he engaged in business entertainment given nor did the Employer provide the number and identity of the guests on each such occasions so that an accurate estimate of the indicated workload could be made.

Appeal. The Employer then moved for reconsideration of the denial of certification on August 27, 1996. AF 2-119. The Employer's motion transmitted excerpts from employers' applications in several other cases and a memorandum argument by counsel in support of the relief requested. The CO affirmed the denial of certification on grounds that the Employer's argument supporting a change in outcome of the case should have been addressed to NOF issues in the rebuttal, citing **Henry Tancredi**, 88 INA 441 (Dec. 1, 1988)(*en banc*).⁶ This application was then referred to the Board, as requested by the Employer. AF 01, 06.

DISCUSSION

Reconsideration and appeal. The Employer moved for reconsideration and for review, if the final outcome was not reversed after the CO's reconsideration. Employer's motion raised issues as to whether or not the position offered was *bona fide* full-time employment under 20 CFR § 656.3, and whether the Job Duties stated in the Employer's Application constituted an unduly restrictive job requirement under 20 CFR § 656.21(b)(2). The CO affirmed the denial of certification after reconsidering the record, and then referred the matter to BALCA for review. The Panel affirms the CO's refusal to consider the new evidence that the Employer filed with her motion to reconsider.

Analysis and conclusion. The CO's Final Determination cannot be affirmed because this matter falls squarely within the Board's newly promulgated holdings in **Carlos Uy, III**, 1997 INA 304 (Mar. 3, 1999)(*en banc*), however. Consequently the panel will hold as the Board concluded *en banc* in **Uy**:

In view of the lack of clarity of the NOF, the inadequacy of the Final Determination, and today's clarification of the "totality of the circumstances" test when the CO raises the issue of *bona fide* job opportunity in an application involving a Domestic Cook, we remand this matter for issuance of a supplemental NOF. This NOF will provide Employer an opportunity to submit evidence of any kind to bolster his contention that he has a *bona fide* job opportunity for a Domestic Cook. The CO shall then consider the existing record and any supplemental documentation submitted by Employer, and issue a Final Determination. If the CO determines that labor certification should be denied, she must explain her rationale for that determination.

Carlos Uy, III, Slip Op., at 16.

ORDER

1. The Certifying Officer's decision denying certification under the Act and regulations is

⁶To the extent that the materials appended to Employer's were relevant, new evidence such documents should have been presented as part of the rebuttal. **Royal Antique Rugs, Inc.**, 90 INA 529 (Oct. 30, 1991).

hereby vacated and this file is remanded for reconsideration for the reasons hereinabove set forth.

2. The Certifying Officer is directed to reexamine the record in the light of the Board's recent decision in **Carlos Uy, III**, *supra*, and issue a second or supplemental Notice of Finding that will direct the parties to file and refile evidence that the position offered is *bona fide*, subject to the totality of circumstances test, under the Act and regulations.

For the Panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

